No. 91-7094

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

WILLIE LEE RICHMOND,

Petitioner,

v.

SAMUEL A. LEWIS, Director, Arizona Department of Corrections; and ROGER CRIST, Superintendent of the Arizona State Prison,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent's Brief in Opposition raises several new arguments. Those arguments, and the decision in Stringer v. Black, ___ U.S. ___, 1992 WL 40776 (March 9, 1992) which bears directly on this case, require a brief response.

A. The Arizona Supreme Court Plurality's "Heinous" Finding.

1. Respondent attempts to avoid the argument that the "heinousness" determination in this case is unconstitutional under Maynard v. Cartwright, 486 U.S. 356 (1988), arguing that Petitioner's sentence did not "rest" on this finding, because "[o]nly two of the five Justices of the Arizona Supreme Court found the especially heinous factor applicable ...." Resp. Br. Opp. 16. This argument defies logic.

There are five Justices of the Arizona Supreme Court. Three votes are required for decision. In this case, two Arizona Justices--whom the opinions call the "majority"--voted to affirm the death sentence on the basis that the crime was "heinous" or "depraved," although not "cruel". Pet. App. C-9-10. They did not indicate whether they would have voted differently--to reverse the death sentence, or to remand for resentencing--if this aggravating factor was eliminated from their consideration. Three Justices found the crime was not "especially heinous." Two of these Justices voted to affirm, because there were other valid aggravating factors. Pet. App. C-12-13. The third Justice--the only one who both recognized the invalidity of the "heinous" finding here, and independently reweighed aggravation and mitigation after excluding that factor--voted to reduce Petitioner's sentence to life imprisonment.

Without the concurrence of both two-Justice pluralities, plainly the outcome of this case would have been different. Either group, together with the dissenting Justice, would have formed a majority to reverse or vacate Petitioner's sentence of death. Petitioner has argued, and maintains, that the decisions of both pluralities fell into constitutional error--the "majority" under Maynard, the concurrence under Clemons v. Mississippi. Because both groups of Justices were necessary to affirm Petitioner's sentence, by simple mathematics, if either of those arguments is correct, Petitioner's sentence cannot stand.

In similar situations, when the votes of state court judges necessary to make up a majority are based on a premise that is invalid under federal law, the Court has found that remand is necessary to avoid the risk that the state court would have decided differently if it had correctly understood and applied the law. United Airlines v. Mahin, 410 U.S. 623, 632 (1972). Cf. California v. Krivda, 409 U.S. 33, 35 (1972); Perkins v. Benguet Consolidated Mining Co., 342 U.S. 437, 443 (1952). The Eighth Amendment underscores that requirement where the state court involved is the final decisionmaker in a capital case. Clemons v. Mississippi, 110 S.Ct. 1441 (1990); Eddings v. Oklahoma, 455 U.S. 104 (1982); cf. Mills v. Maryland, 486 U.S. 367 (1988). Respondent's argument that this error can be ignored because some state court judges reached the same conclusion for different (and, we submit, separately erroneous) reasons is supported by neither law nor logic.

2. Contrary to Respondent's attempt to restate this issue, Petitioner certainly does "challenge the limiting construction of the especially heinous factor applied by Justices Hays and Holohan." Resp. Br. Opp. 17. See Petition at 19-22. The first question presented here clearly includes that point, but is not limited to it, because the decisions below raise even broader issues about state appellate decisionmaking in capital cases.

That question focuses on the failure of the Arizona Courts, at any stage of this case, to clearly resolve the factual issue of the identity of the person who caused the victim's death. To avoid it, Respondent attempts to patch together several trial level findings to persuade this Court that there was such a resolution of that critical factual issue in the state trial court. Resp. Br. Opp. 19-25.[1]

The linchpin of Respondent's present argument is the trial court judge's recitation of the F(6) aggravating factor: "the defendant did commit the offense in this case in an especially heinous and cruel manner." Resp. Br. Opp. 19; see Pet. App. D-3. Respondent argues that "the only offense to which that circumstance applied was first degree murder, [so] the trial court clearly was saying that Willie Lee Richmond committed the murder." Ibid. But, as the trial court also noted, in this case the charge included first degree felony murder. See Pet. App. D-5. Under Arizona's felony murder rule, all participants are equally guilty of "the offense," regardless of who actually causes death. Thus, the trial court also found as mitigating

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[1]Respondent has taken different positions on this elsewhere. It initially conceded in the Court of Appeals that "it is true that the trial court did not make a specific finding on th[e] question" of whether Petitioner "killed, intended to kill, or contemplated death would occur." Resp. Brief at 40, Richmond v. Ricketts, 9th Cir. No. 84-2809. In a published official description of the case, Profiles of Arizona Death Row Inmates (November 1991) at 68, the Respondent Attorney General has similarly acknowledged that the evidence shows the car was driven by "either Richmond or one of the girls."

factors "that Rebecca Corella was involved in the offense" and "that Faith Irwin was involved in the offense," although neither was charged with a crime. Pet. App. D-4.

Stating its point another way, Respondent asserts "[o]ne cannot commit an offense in a particular manner unless one commits the offense." Resp. Br. Opp. 19. That sounds plausible, but it was not the law of Arizona at the time of Petitioner's sentencing. State v. Tison, 633 P.2d 355, 364 (Ariz. 1981), explicitly "reject[ed] the appellant's argument that this aggravating circumstances can be found only if he actually committed the murders." See Tison v. Arizona, 481 U.S. 137, 160 n.3 (1987) (dissenting opinion of Justice Brennan). The trial court's conclusory recitation of this aggravating factor was made without any of the later-announced limiting constructions of its facially vague terms. See Pet. App. A-21. It cannot be read to imply any specific determination about Petitioner's actions or intent.

Respondent also makes a second line of argument--also new in this Court--out of the trial court's failure to find the G(4) mitigating circumstance. Resp. Br. Opp. 21. The subsection setting forth that factor reads as follows:

> The defendant could not reasonably have foreseen that his conduct ... would cause, or would create a grave risk of causing, death to another person.

Under Arizona law, the defense has the burden to establish this, or any other mitigating factor. Ariz. Rev. Stat. §13-703(C); see

Walton v. Arizona, 110 S.Ct. 3047, 3055 (1990). At most, therefore, Respondent's argument establishes that the trial court found that the defense had not proved, by a preponderance of the evidence, Petitioner "could not reasonably have foreseen" Bernard Crummett's death. That hardly amounts to a finding that, beyond a reasonable doubt, Petitioner himself caused that death.

Respondent's argument therefore reduces to a dispute over the relative strength of the evidence as to who was driving the getaway car at the fatal moment. Resp. Br. Opp. 22-25. We do not agree with its characterizations, but we will not answer them here; for, of course, our point is not that the state courts misread the evidence in this case. Our point is that no state judge clearly made this critical finding, before sentencing Petitioner to death on a ground that cannot stand without it.

The "heinous" aggravating factor which the "majority" Arizona Justices weighed in the statutory balance in favor of death, was supposed to describe "the mental state and attitude of the offender as reflected in his ... actions." Pet. App. C-8.[2] To apply such a factor without determining what the defendant actually did is intolerably "vague and imprecise, inviting arbitrary and capricious application of the death penalty in violation of the Eighth Amendment," the antithesis of "the

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[2]The original sentence says "words and actions ...." See Petition 18; Pet. App. C-8. We have here omitted the reference to "words" because there has never been any suggestion that anything Petitioner said made this crime "heinous."

precision that individualized consideration demands under the Godfrey and Maynard line of cases." Stringer v. Black, 1992 W.L. at 40776*3.

In this regard, Stringer reinforces the teachings of Parker v. Dugger, 111 S.Ct. 731 (1991)--which Respondent never mentions --that "[m]eaningful appellate review requires that the appellate court consider the defendant's actual [conduct]", or base its decision on trial level findings that were actually made. 111 S.Ct. at 738-39. Certiorari is warranted here because the Court of Appeals endorsed a review by the "majority" Arizona Justices, which included neither of those things.

B. The Clemons v. Mississippi Issue.

1. Respondent acknowledges that "it is the Arizona Supreme Court's usual practice to remand a case for resentencing when it eliminates an aggravating circumstance,"[3] but argues that this is merely a matter of "discretion" with no federal constitutional implications. Resp. Br. Opp. 26, 27. This misreads Petitioner's arguments, and Arizona law.

Respondent misconstrues Arizona law by adopting the panel's rationale: that the requirement of "sufficiently substantial" mitigation implies no weighing of aggravating against mitigating

[3]For instances in which the Arizona Supreme Court has elected to remand for resentencing in this situation, see, e.g., State v. Schaaf, 819 P.2d 909 (Ariz. 1991); State v. Hinchey, 799 P.2d 352 (Ariz. 1990); State v. Lopez, 786 P.2d 959 (Ariz. 1990); State v. Wallace, 728 P.2d 232 (Ariz. 1986); State v. Rossi, 706 P.2d 371 (Ariz. 1985); State v. Smith, 665 P.2d 995 (Ariz. 1983); State v. Gillies, 662 P.2d 1007 (Ariz. 1983).

factors. Resp. Br. 30-31. Tellingly, Respondent does not cite a single Arizona decision to support this; it simply ignores the numerous contrary state authorities Petitioner has compiled. Petition 25-26. Respondent does cite several cases in which the Arizona Supreme Court has decided not to remand for resentencing by the trial judge. Resp. Br. Opp. 26-27. But these cases do not support Respondent's broader argument, because in each of them the Arizona Supreme Court said it had conducted an independent reweighing of the valid aggravating and mitigating circumstances, as Clemons v. Mississippi, 110 S.Ct. 1441 (1990) held it could do. The two concurring Justices in this case--whose actions give rise to this issue--did not do that.

2. Respondent misses this point, and assumes that Petititioner's Clemons argument depends on the separate claim that the Arizona Supreme Court "majority's" "heinousness" finding is invalid. Resp. Br. Opp. 31ff. As we have tried to make clear, Clemons is relevant here independently of the Maynard issue, because of the position taken by the two concurring Arizona Justices who agreed that the crime could not be found to be "heinous." See Petition at 24 n.13. Those two Justices voted to affirm Petitioner's death sentence, despite their position that this aggravating factor did not exist, without any indication that they had independently determined the mitigating circumstances were not "sufficiently substantial" in relation to the two statutory aggravating circumstances which remained.

Instead, they used the kind of "automatic affirmance" approach forbidden by Clemons, saying they affirmed because Petitioner's prior record "places him above the norm of first degree murderers." Pet. App. C-12.

In other words, although the concurring Justices agreed that "the sentencing body [was] ... told to weigh an invalid factor in its decision," they conducted neither a "constitutional harmless error analysis or reweighing at the ... appellate level ... to guarantee that the defendant received an individualized sentence." Stringer v. Black, 1992 W.L. 40776*6. Instead, much like the Mississippi court in Stringer, they affirmed the death sentence essentially on the ground, that "the evidence fully support[ed] ... statutorily required aggravating circumstances ... and the death sentence was not disproportionate to sentences imposed in other cases." Id. at *3 (internal quotations omitted). Compare Pet. App. C-12-13. The one Justice who agreed that the crime was not "heinous," but reweighed the remaining aggravating factors against the evidence in mitigation, reached the opposite result, and voted to reduce Petitioner's sentence to life imprisonment. Id. at C-13-14.

Although the action of the two concurring Justices in this case may be an aberration from Arizona's usual approach to appellate capital sentence review, it has nonetheless left Petitioner under an unconstitutional death sentence. Of broader import, the Ninth Circuit's reconstruction of Arizona law to

endorse that aberration has created confusion and a direct conflict between the lower state and federal courts. As we have demonstrated (Petition at 24-6), the Arizona Supreme Court, "which is the final authority on the meaning of [Arizona] law, has at all times viewed its sentencing scheme as one in which aggravating factors are critical in the ... determination whether to impose the death penalty." Stringer v. Black, 1992 W.L. 40776 The Ninth Circuit panel "made a serious mistake" because it "ignored the ... [Arizona] Supreme Court's own characterization of its law and accorded no significance to the fact that in [Arizona] aggravating factors are central in the weighing phase of a capital sentencing proceeding." Id. at *9.

Certiorari should be granted here to correct that mistake and resolve this matter--which is "of critical importance" (id. at *6) in this case and in all capital cases in Arizona.

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Respondents.

CERTIFICATE OF SERVICE

TIMOTHY K. FORD hereby certifies:

That on the 11 day of March, 1992, I mailed a copy of Petitioner's Reply to Brief in Opposition to Petition for Writ of Certiorari, by United States Mail, postage prepaid, to:

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March 11, 1992

BY FEDERAL EXPRESS

Hon. William K. Suter, Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Richmond v. Lewis, No. 91-7094

Dear Mr. Suter:

Enclosed please find an original and nine copies of Petitioner's Reply to the Brief in Opposition in this case, and a Certificate of Service.

Thank you for your attention to this.

Sincerely,

Timothy K. Ford

TKF/ls
Enclosures

cc: Jack Roberts, Esq.
Carla Ryan, Esq.
Willie Lee Richmond